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January 23, 1995

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RE: MM Docket No. 94-131 and PP Docket No. 93-253

Dear Mr. Caton:

Transmitted herewith for filing with the Commission are an original and five copies of "Comments" in the above-referenced proceedings.

Should there be any questions concerning this matter, please communicate with this office.

Respectfully submitted,

William D. Wallace

cc: Barbara A. Kreisman
Sharon Bertelsen
Jerianne Timmerman

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Services and in the Instructional Television Fixed Service	)	MM Docket No. 94-131
	)	
and	)	
	)	
Implementation of Section 309(j) of the Communications Act Competitive Bidding	)	PP Docket No. 93-253

COMMENTS

John T. Scott, III
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Dated: January 23, 1995

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To: The Commission

COMMENTS

I. SUMMARY

In its Notice of Proposed Rule Making, FCC 94-293 (released Dec. 1, 1994) ("NPRM"), in this proceeding, the Commission has proposed rules which are laudable and much-needed. As the Commission recognizes, development of the Multipoint Distribution Service ("MDS") has long been mired in delay, arising from application processing procedures which have induced too many speculative filings and have required a disproportionate allocation of limited Commission resources. Moreover, the present licensing scheme has resulted in a patchwork of MDS stations which are unable to compete with entrenched, monopoly wired cable

TV operators. This status quo does not serve the public interest. The proposed rules would restructure the licensing process, and thereby facilitate the Commission's effort to promote MDS as a genuine competitor to the incumbent cable TV providers. Accordingly, the Commission's proposed changes should be promptly considered and implemented as discussed below. Specifically, the Commission should: (1) award MDS licenses for predetermined geographic areas; (2) expand protected service areas to conform to the geographic license areas; and (3) allow existing MDS operators the first opportunity for new licenses.

II. BROAD GEOGRAPHIC LICENSE AREAS WOULD ACHIEVE THE MOST EFFICIENT USE OF SPECTRUM AND BEST PROMOTE THE DEVELOPMENT OF WIRELESS CABLE.

The Commission should adopt its preferred approach to award MDS licenses for broad, predetermined geographic areas. This proposal is consistent with recent Commission rulemakings designed to simplify its administrative procedures and to facilitate development of competitive alternatives to incumbent cable TV providers. With respect to MDS, adoption of geographic licensing, preferably for Areas of Dominant Influence (ADI), is essential to achieving the Commission's goals of developing the wireless cable industry and streamlining the processing of MDS applications.

In several recent proceedings to allocate spectrum for and license new communications services, the Commission has determined that a geographic license approach is far better than traditional, site-by-site licensing. It has

consistently found that licensing by broad geographic areas is simpler to administer, avoids burdensome litigation, promotes more rapid development of new technologies, and thus can expedite new competition to existing service providers. The reasons the Commission has chosen geographic area licensing in those proceedings are equally applicable to MDS.

For example, in 1992, the Commission created the Interactive Video and Data Service ("IVDS"), a new wireless programming service which will offer subscribers two-way capability for receiving and sending programming.[1] The Commission had initially proposed to license IVDS on a site-by-site basis by awarding each licensee a 40-mile protected service area measured from its transmitter site. Commenters opposed this approach as administratively complex and likely to delay service to the public. The Commission agreed, and instead decided to award licenses in predetermined geographic areas. IVDS Order, 7 FCC Rcd at 1638, ¶¶ 59-62. It concluded: "We agree that pre-designated filing areas will reduce the administrative burdens on both the public and the Commission. Further, pre-designated filing areas will eliminate daisy-chains and thus allow the Commission to license IVDS systems much more quickly, especially in the more populated areas of the country." Id., at ¶ 62.

Again, in 1993, the Commission proposed licensing a new video service by predetermined geographic areas. Its rulemaking notice for the new Local

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[1] Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide Interactive Video and Data Services, 7 FCC Rcd 1630, recon., 7 FCC Rcd 4923 (1992) ("IVDS Order").

Multipoint Distribution Service ("LMDS") proposed using discrete geographic areas, the "Basic Trading Areas" defined by Rand McNally, for awarding licenses. It chose geographic areas in part "to maximize the competitive strength of LMDS stations in order to provide as much competition in video distribution and telecommunications services as possible."[2]

In 1994, the Commission once again moved away from site-by-site licensing and toward geographic area licensing, this time in the Specialized Mobile Radio Service.[3] Previously, SMR licenses had been awarded only for specified transmitter sites. This made it difficult, the Commission found, for licensees to combine sufficient sites to offer a wide-area service which customers wanted, and to compete with cellular licensees, who did enjoy geographically-defined service areas. The Commission found that SMR licensees "face significant competitive obstacles because channel assignment is on a station-by-station, channel-by-channel basis." CMRS Order, at ¶ 85. It thus concluded that new licenses should be awarded for predetermined geographic blocks, choosing the MTAs already being used to license the new PCS service:

> [A]ssigning channel blocks in Commission-defined service areas eliminates the need for many of the complicated and burdensome licensing procedures that have hampered SMR development in the past. . . . We conclude that standard Commission-defined areas are simpler to administer, will provide licensees and the public with

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[2] Rules and Policies for Local Multipoint Distribution Service, 8 FCC Rcd 557, ¶ 30 (1993).

[3] Implementation of Sections 3(n) and 332 of the Communications Act, 76 RR 2d 326, 356, at ¶¶ 84-99 (1994) ("CMRS Order").

> greater certainty about what area is covered by each authorization, and will make it easier to resolve conflicts between applicants seeking to provide service to a common area.

Id., at ¶¶ 97-99.

The public interest factors which led the Commission to adopt or to propose geographic service areas for IVDS, LMDS and SMR apply with equal force to MDS. Adopting a geographic approach for MDS would speed application processing and ease the enormous administrative burdens currently plaguing MDS. With the geographic approach, the service areas to be licensed can be easily identified, and, since a competitive bidding process is used, licenses can be issued promptly. In contrast, for example, if the Commission were to adopt its "national window" approach for specific sites (NPRM, ¶ 12), it would be required to identify permissible transmitter sites throughout the country. This would be a time-consuming process which would inevitably generate endless challenges.

Moreover, one of the current problems holding back the development of MDS is the difficulty of amassing sufficient channel capacity in a wide-area market to ensure a competitive video programming service. Just as with SMR, the current site-by-site licensing approach for MDS has ensured a patchwork of license areas and licensees. Multiple MDS licensees in the same market currently must compete with each other to aggregate channel capacity, imposing further obstacles to development of the industry as a competitor to incumbent cable TV providers. A decade of slow growth in the wireless cable industry should be sufficient evidence that the site-by-site approach does not work.

It is also particularly important that the Commission move to a geographic area licensing approach, because competing services are being or will be licensed in that way. Failure to adopt the same system used for IVDS and proposed for LMDS would leave MDS at a serious competitive disadvantage. To resolve these administrative and competitive concerns, use of geographic MDS license areas would best serve the public interest.

The Commission should adopt ADI's as the license areas for MDS.[4] ADI's reflect natural video programming markets, and therefore would allow MDS licensees to develop systems in a large service area with a relatively cohesive subscriber base. Such a larger subscriber base is essential if MDS operators are to penetrate markets served by monopoly wired cable systems. Moreover, among the proposed geographic service areas, ADI's would be the easiest to administer. An auction for ADI's would be much easier to accomplish than for MSA's/RSA's. ADI's may also attract more interest from bidders because they would offer more "usable channels" than MSA's and RSA's. These characteristics of ADI's would more likely facilitate conversion of MDS from the site-by-site approach to the

[4] The winning bidder for MDS spectrum should obtain the authority to operate on all available MDS frequencies in the ADI, subject to interference protection for previously authorized stations. That is, the ADI license should include available frequencies on Channel 1 and Channel 2 and the E-, F- and H-Channel Groups.

geographic licensing scheme proposed by the Commission, and so, the Commission should adopt an ADI licensing plan.[5]

III. TO ACCOMMODATE BROAD GEOGRAPHIC LICENSE AREAS, THE COMMISSION SHOULD MODIFY THE RULES GOVERNING PROTECTED SERVICE AREAS FOR MDS STATIONS.

In order to maximize the ability of an MDS licensee to provide service to subscribers within a unified market, the Commission should modify several of its rules regulating the MDS "protected service area."

Protected Service Area. The Commission is correct in questioning the continued use of the 15-mile protected service area after adoption of geographic service areas for MDS. See 47 C.F.R. § 21.902(d)(1). As a general principle in licensing radio transmitters, interference protection should be co-extensive with the boundaries of the geographic license area.

With respect to MDS, the current 15-mile radius model may not best describe the geographic service area which an MDS auction winner may acquire. Providing service to ADI's may require service to areas which are not generally circular. Fill-in areas between existing ITFS and MDS stations may require installation of directional transmitters and beam-benders for which the 15-mile radius model would not provide sufficient protection.

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[5] ADI's were used until last year by the Arbitron Ratings Company, and form the basis for many of the Commission's cable rules. Because, however, Arbitron decided last year not to update the ADI lists, the Commission may alternatively want to use the analytically similar "Designated Market Areas," which are defined by the A.C. Neilsen Company.

Moreover, licensing available MDS channels on an ADI basis is intended to ensure that service is provided throughout an area larger than the rules currently allow. Given the needed investment in equipment (e.g., signal boosters), an ADI licensee would have little motivation to serve the market beyond a 15-mile radius of each transmitter unless it can receive protection from harmful interference commensurate with its investment. Without such protection, the interest in and value of MDS licenses may drop significantly, jeopardizing the complete roll-out of wireless cable and any revenues which could be derived from competitive bidding. Accordingly, the area in which a licensee receives protection from harmful interference should be co-extensive with the licensed geographic area.

System Engineering. Without regard to the protected service area boundaries, in revamping the MDS rules, the Commission must provide sufficient flexibility to the MDS operator to engineer its system to maximize coverage. For example, wireless cable service based on an ADI approach may be engineered more efficiently in a manner other than the central transmitting site currently contemplated by the MDS rules. A series of directional antennas may be more suitable to the terrain and cityscape. Moreover, the system appropriate for one ADI may be inappropriate for the next. It would be difficult to adopt a specific rule which would provide this flexibility.

Accordingly, under the geographic approach, an MDS licensee should be granted the authority to establish transmitter sites anywhere within the

boundaries of its service area, subject to interference protection standards.[6] Because engineering the MDS system may be an ongoing process over time, the licensee should not be required to seek prior approval for each of these sites, as long as installation would not increase the potential for interference to existing stations described in the MDS licensee's initial interference analysis. The Commission could, for example, implement a post-installation certification procedure, similar to the MDS low-power signal booster rules (47 C.F.R. § 21.913(g)), which would provide a certain time period for other MDS and ITFS licensees to claim interference. Such flexibility to engineer the wireless cable system within the licensed service area would eliminate administrative delays in processing "minor amendment" applications. And, it would thereby increase the value of the station to potential bidders by the reduction in administrative costs and burdens in implementing a wide-area system. Accordingly, as long as basic interference protection standards are met, the Commission should permit an MDS licensee to configure its system to provide what it considers to be the most efficient and effective coverage within its service area.

ITFS Excess Capacity. If the Commission modifies the protected service area for the ADI licensee of the MDS channels, then it must also adopt a corresponding modification to Section 74.903(d) of the Commission's Rules.

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[6] The Commission has recently taken this approach in the cellular radio service. "Internal" cell sites which provide service within a system's geographically-defined market require no prior licensing by the Commission. Revision of Part 22 of the Commission's Rules Governing the Public Mobile Radio Services, CC Docket No. 92-115, ¶ 86 (released Sept. 9, 1994).

Section 74.903(d) allows an ITFS licensee to request a 15-mile protected service area for its frequencies during leased airtime for wireless cable operations.

Modifying this rule follows necessarily from the Commission's other proposed changes. One of the Commission's goals in the NPRM is to allow wireless cable operators to amass a large number of channels to provide a competitive video programming service. As it recognizes, this includes leased time on ITFS frequencies. Accordingly, an ADI licensee of MDS channels, which also leases ITFS frequencies, should have the opportunity to extend its programming throughout the area on both the ITFS and MDS channels, subject to interference protection standards.[7]

IV. INCUMBENT MDS OPERATORS SHOULD RECEIVE THE FIRST OPPORTUNITY TO OBTAIN ADDITIONAL AVAILABLE SPECTRUM.

The Commission recognized that providing existing MDS licensees and operators with the first opportunity to obtain additional available licenses would "encourage enhancement of existing wireless cable operations, and thus accelerate opportunities for competition with wired cable systems in various locales." NPRM, ¶ 14. The Commission only proposed this preference for existing MDS operators with reference to its "national window" approach to issuing MDS licenses. However, the benefits of this approach would also be obtained under the

[7] The Commission should also modify Section 74.990 as needed to allow the licensee of an MDS geographic service area to apply for unused ITFS frequencies anywhere within the protected service area.

geographic license area approach, and so, should be adopted no matter which procedure is ultimately implemented.

Allowing current MDS operators to amass additional channels would encourage the development of existing systems as competitors for incumbent cable TV providers. The Commission has, in fact, already reached this conclusion under analogous circumstances. In the Second Wireless Cable Service Report and Order, 69 RR 2d 1499, 1512-16 (1991), recon., 71 RR 2d 301 (1992), the Commission adopted a rule which permits existing wireless cable operators to apply for unused ITFS frequencies. 47 C.F.R. § 74.990. The Commission requires that MDS applicants for ITFS frequencies hold an unopposed application, conditional license, license or lease for at least four MDS channels which would be used with the ITFS frequencies. Id., § 74.990(c). The Commission found that providing this opportunity for existing MDS systems afforded a "reasonable expectation of prompt wireless cable service." Second Report and Order, 69 RR 2d at 1513. The same reasoning applies with respect to licensing usable MDS channels. In addition, allowing those operators with demonstrated investment in the service to have the initial opportunity for available frequencies would minimize the speculation for MDS licenses that has plagued the Commission's prior efforts to develop the service.

As the Commission recognizes in the NPRM (¶ 9), adoption of such a preference is consistent with its obligations to provide a fair hearing under Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). It has long been established

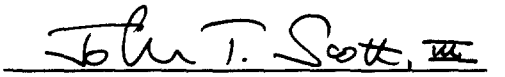
that the Ashbacker requirement of a comparative hearing for mutually exclusive applicants does not apply to applicants who fail to meet an eligibility requirement established by the Commission by rule. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Hispanic Information & Telecommunications Network v. FCC, 865 F.2d 1289 (D.C. Cir. 1989). For example, in Hispanic Information the Commission determined, after mutually exclusive applications were filed for ITFS licenses, that local applicants would be automatically preferred to non-local applicants. This rule was based on the Commission's policy finding that local licensees would provide better service consistent with the public interest.

Similarly, if the Commission makes the policy determination that grant of available MDS licenses to existing operators would serve the public interest by promoting development of wireless cable systems, then the Commission should have the authority to limit an auction for such licenses to existing operators. As in Hispanic Information, the Commission would not by so doing deny by fiat the applications of non-MDS entities, but rather, would establish an eligibility standard based on well-considered policy goals. The fact that the eligibility requirement may make it more difficult for some applicants to obtain licenses does not violate their hearing rights; rather, it is a legitimate exercise of the Commission's "rulemaking authority necessary for the orderly conduct of its business." Storer, 351 U.S. at 202; see Hispanic Information, 865 F.2d at 1294-95.

V. CONCLUSION

The Commission's proposed modifications to the MDS processing rules represent an important step in jump-starting the wireless cable industry. To ensure that the changes accomplish their goal of facilitating the ability of wireless cable operators to compete with incumbent cable TV providers, the Commission should adopt the approach of geographic service areas with commensurate modifications to the protected service area rules as outlined above. The Commission's efforts and goals are commendable, and the new licensing scheme should be implemented as quickly as possible.

Respectfully submitted,



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Dated: January 23, 1995